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IN THE

Supreme Court of the United States

October Term, 1969.

No. 1618

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL, ABRAHAM E. FREEDMAN and LEON KARCHMER,

Petitioners,

v.

JAMES MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

ABRAHAM E. FREEDMAN,
Lafayette Building, Eighth Floor,
Philadelphia, Pennsylvania. 19106,
Counsel for Petitioners Joseph Curran, Shannon Wall, William Perry and Abraham E. Freedman.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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OCTOBER TERM, 1969.

No.

SEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL, ABRAHAM E. FREEDMAN AND LEON KARCHMER,

Petitioners,

v.

MES MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE NATIONAL MARITIME UNION OF AMERICA,

Respondents.

ETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Joseph Curran, Shannon Wall. William ry and Abraham E. Freedman, respectfully pray that a it of Certiorari issue to review the final judgment of the ted States Court of Appeals for the Second Circuit, ered in the above-entitled matter on March 31, 1970.

OPINIONS OF THE COURTS BELOW.

The memorandum decision of the District Court for the Southern District of New York is reported at 302 F. Supp. 32 (1969) (Joint Appendix, p. 49a; *infra*, p. A1); the order thereon is printed in Joint Appendix below, p. 93a (*infra*, p. A11). The memorandum decision of the District Court for the Southern District of New York on the defendants' motion for re-argument is not officially reported but is printed in the Joint Appendix, p. 91a (*infra*, p. A8). The decision and order of the District Court for the Southern District of New York denying the motion of plaintiffs for an injunction is not officially reported but is printed in the Joint Appendix, p. 92a (*infra*, p. A9). The opinion of the Court of Appeals for the Second Circuit and the dissenting opinion are not yet officially reported, but are printed in Appendix E hereto, *infra*, p. A14.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was entered on February 20, 1970 (*infra*, p. A38). Timely petitions for rehearing and rehearing *in banc* by defendants-appellants Joseph Curran, Shannon Wall, William Perry and Abraham E. Freedman were denied by Orders of March 31, 1970 (*infra*, pp. A40, A41). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

. Where the National Office of a union was given the itutional rights to fix salaries for the Union's em- es, and pursuant to said authority granted them pen- was it not error for the Court below to refuse to apply ıle that the courts will not disturb a Union's own fair easonable interpretation of its constitution, and instead date the pensions by substituting its own unique inter- tion of the term "salaries" notwithstanding the fact such term, in its normal and customary meaning, in- s pensions which are deferred payments of salaries?

. Where, after the District Court invalidated the em- e pensions as being *ultra vires*, the union membership, ferendum vote, amended its constitution to expressly le employees within the pension plan and to validate ayment of all past pensions, was it not error for the below to hold that such amendments were "exculpa- provisions" prohibited by Section 501 of the Labor- gement Reporting and Disclosure Act of 1959?

. Where numerous pensions were paid over an eight- period and were well-publicized, was it not error for ourt below to grant summary judgment revoking these ns without a hearing on disputed facts, and to hold aches could never be a defense under Section 501 of abor-Management Reporting and Disclosure Act of

STATUTORY PROVISIONS INVOLVED.

he statutory provisions involved are Section 501(a)) of the Labor-Management Reporting and Disclosure f 1959 (LMRDA), 73 Stat. 535, 29 U. S. C. § 501(a)). They are printed in Appendix I, *infra*, p. A42.

STATEMENT OF THE CASE.

Prior to 1960, the constitution of the National Maritime Union of America provided that the salaries of both officers and employees were to be fixed by the union's National Council and subject to membership approval (Art. 15, sec. 1).[1] In 1960, the NMU constitution was extensively revised to streamline the union's operations. As part of this revision, the authority to fix *employee* salaries was transferred from the union's National Council to its National Office,[2] and the requirement of membership approval of *employee* salaries was abolished. The revision left intact the provision dealing with *officers'* salaries, requiring that they be fixed by the National Council and be subject to membership approval (Art. 14, Sec. 1).[1] The pre-1960 constitution had treated both officer and employee salaries in a single Article entitled "Salaries of Officers". The 1960 amendments eliminated the reference to employees in this section and placed it in Article 8, Section 11(a) and (b),[1] dealing with the powers of the National Office.

The instant suit was started in February 1969, after hundreds of thousands of dollars had been paid to employees under the pension plan. Plaintiffs contended that the 1960 amendments *revoked* the authority to provide pensions for employees, and that all payments made for employee pensions constituted a breach of defendants' fiduciary duties under Section 501 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U. S. C. A. 501.[3] Plaintiffs sought an accounting, repayment of all moneys and an injunction against future payments.

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1. The relevant provisions of the N. M. U. Constitution and amendment are set out in Appendix J, p. A44, *infra*.

2. The National Office consists of the National President, National Secretary-Treasurer, three Vice-Presidents and three National Representatives.

3. Act of Sept. 14, 1959, P. L. 86-257, Title V, § 501, 73 Stat. 535, 29 U. S. C. A. 501, Subsections (a) and (b) of the Act, herein relevant are set out in Appendix I, p. A42, *infra*.

Defendants filed a motion for summary judgment based on an affidavit of undisputed facts. Plaintiffs filed a cross-motion for summary judgment. Defendants filed an answering affidavit alleging that summary judgment was not possible on plaintiffs' motion because there were defenses, including laches, on which there were disputed issues of fact which required a hearing.

The District Judge granted plaintiffs' motion for summary judgment, and refused to consider whether the union's own interpretation of its constitution was fair and reasonable. He concluded that while the term "salaries" may, in its normal and customary usage, include pensions, it had been used in the NMU constitution in a more restricted sense as not including pensions. This conclusion was based on the deletion of the reference to employees from the article entitled "Compensation of Officers". The District Court also held that laches was not a defense even though there had been no hearing on this issue. On re-argument, the District Judge's attention was called to the fact that the reference to employees had not been taken out of the constitution but simply transferred to another section, but the District Judge affirmed his prior holding. He entered an order directing an accounting, repayment of all money paid for employee pensions, and enjoining future payments (*infra*, p. A12). The total effect of the decision was to direct the repayment of hundreds of thousands of dollars paid out to retired employees and to deprive these existing pensioners of their pensions, as well as to deprive present employees of the pensions which were agreed upon as part of their remuneration.

Immediately after the announcement of the decision, and notwithstanding its own position on the interpretation of its constitution, the union set in motion the necessary steps to amend its constitution by referendum ballot to provide the authority which the District Court had found to be lack-

ing (Joint App. 81a). The membership overwhelmingly approved the amendments which expressly granted pension rights to *employees* including those employees already granted pensions (Joint App. 95a-96a).[4] While the vote on the amendments was going on, the plaintiffs moved to restrain their implementation, as being "exculpatory provisions" prohibited by Section 501(a) of the LMRDA, but the District Judge ruled that the amendments were not "exculpatory", but were designed to include employees in the pension plan (Joint App. 92a).[5] The union then appealed from the Court's decision holding that employees could not be included within the pension plan under the constitution. Thereafter, the plaintiffs appealed from his decision holding that the constitutional amendments were not exculpatory. The Court of Appeals, in a split decision, affirmed that part of the decision holding that employees were not entitled to pensions under the constitution, and reversed that part of the decision which had held the amendments were not exculpatory. Senior Circuit Judge John A. Danaher of the District of Columbia Circuit, sitting specially in the Second Circuit, strongly dissented on all grounds. With respect to whether employees were constitutionally included in the pension plan, Judge Danaher, looking to the intent of the 1960 amendments, stated:

> "I deem it unthinkable that the NMU membership supposed for a moment that the amended Constitution was intended to wipe out whatever rights to coverage had been acquired since 1952 . . . I reject the suggestion that the Constitution, as revised, had narrowed the authority of this Union to provide pensions for any of its 47,000 members, whether they be elected officers or employees . . .
>
> * * *

4. *Infra,* Appendix J, A45.
5. *Infra,* Appendix C, A9.

". . . My reading of the record and my construction of the NMU Constitution convince me, first, that it had always been the plain intendment of this Union that pensions for both officers and employees be authorized; . . .

* * *

"Nothing to be discerned from the revised Constitution, ratified December 2, 1960, detracted one whit from that authority. Rather, I suggest, the later revision must be read with the former. The only difference in giving effect to the continuing intent of the Union membership was that after the 1960 revision, the authority to act was transferred from the National Council to the National Office."

With respect to the majority's holding that the 1969 amendment was exculpatory, Judge Danaher stated:

"These plaintiffs then attacked the amendments as 'exculpatory' within the meaning of 29 U. S. C. § 501, and they sought an injunction. The District Judge flatly—and correctly—rejected that contention and ruled that the amendments 'were not exculpatory provisions prohibited by 29 U. S. C. § 501. *Their purpose is obviously to include non-officer employees in the NMU Officers' Pension Plan.'*

* * *

". . . the District Judge should have entered summary judgment in behalf of the defendants, thus rendering moot whatever claim had previously been urged upon the court by these plaintiffs. To take any other view, as it seems to me is not only to deny NMU its right to manage its own affairs, but in view of the

rectification of whatever oversight the judge thought he had detected, the membership clearly restated its approval of the authority of the National Office and of the Trustees to provide pensions for all officers and all employees." (Emphasis by Judge Danaher.)

On the question of laches, the majority held that this defense was not applicable, despite the absence of a hearing. Judge Danaher dissented on this point also. A petition for rehearing was denied, with Judge Danaher again dissenting.

REASONS FOR GRANTING THE WRIT.

I. The Refusal of the Court Below to Follow the Legal Principle That a Union's Interpretation of Its Constitution, if Fair and Reasonable, Will Not Be Disturbed by the Courts, Is in Conflict With the Decisions of the Court of Appeals for the District of Columbia Circuit in English v. Cunningham, 282 F. 2d 848 (D. C. Cir. 1960) and Numerous State Courts.

Prior to the decision in *English v. Cunningham,* 282 F. 2d 848 (D. C. Cir. 1960), the principle that courts will not disturb interpretations by union officials of their own constitutions and rules if they were fair and reasonable, was well established in the state courts. *DeMille v. American Federation of Radio Artists,* 31 Cal. 2d 139, 187 P. 2d 769, cert. den., 317 U. S. 644; *Simpson v. Grand International Brotherhood of Locomotive Engineers,* 83 W. Va. 355, 98 S. E. 580, cert. den., 250 U. S. 644; *Shaup v. Grand International Brotherhood of Locomotive Engineers,* 223 Ala. 202, 135 So. 327; *Pratt v. Amalgamated Assn. of Street and Electric Ry. Employees of America,* 50 Utah 472, 167 P. 830; *Lang v. International Photo Engravers Union,* 343 S. W. 2d 385; *Weinstock v. Ladisky,* 197 Misc. 859, 98 N. Y. S. 2d 85. The legislative history of the Labor-Management Reporting and Disclosure Act reveals that Congress intended to adopt the state rule in this respect. See House Report No. 741 on H. R. 8342—Vol. 1 Legislative History LMRDA p. 839; Senate debates, Congressional Record, April 23, 1959, p. 5857, Vol. II of the Legislative History of the LMRDA p. 1130.

In *English v. Cunningham, supra,* the question involved the eligibility of union members under the union's rules. The union president had declared ineligible two of its members under the union rules. The District Judge

reversed that ruling and applied his own interpretation of the union rules. On appeal the District of Columbia Court of Appeals approached the problem, not from the standpoint of the interpretation the *Court* would make, but from the standpoint of *whether the union president's interpretation was reasonable,* as follows:

> "We deem applicable the principle that courts will accept the correctness of an interpretation fairly placed on union rules by the union's authorized officials. Weinstock v. Ladisky, 1950, 197 Misc. 859, 98 N. Y. S. 2d 85; Louisville & N. R. R. v. Miller, 1941, 219 Ind. 389, 38 N. E. 2d 239, 142 A. L. R. 1050. And see Communications Workers of America, CIO v. N. L. R. B., 2 Cir., 1954, 215 F. 2d 835. We accordingly accept the interpretation made by the General President under authority delegated to him by the Rules. Section 4(a) of the Rules protects the member 'whose dues have been withheld by his employer' but whose employer defaults or delays in turning over to the union the dues the employer has withheld. It is reasonable to interpret this provision as not applicable when the employer has not withheld the dues and so has not delayed or defaulted in remitting them to the union. In the cases of Giles and Williams the employer did not delay or default; the dues were not withheld by the employer at the usual time since there were no wages then available from which to do so. Therefore, it is reasonable to say that section 4(a), designed to protect the employee from default or delay on the part of the employer, does not apply. We therefore uphold the General President in the cases of Giles and Williams." (282 F. 2d at 850).

The Court of Appeals accordingly reversed the decision of the District Court, and upheld the ruling of the president of the union.

In the instant case, the 1960 amendments delegated to ıe National Office the authority to fix "salaries" of the nion's employees without membership approval. The term salaries", in its normal and customary usage, includes ensions, which are but deferred payments of salaries. *rumley v. Baxter,* 225 N. C. 691, 20 S. E. 2d 205; *Gian-etino v. McGoldrick,* 295 N. E. 208; *Gordon v. Monaghan,* 09 N. Y. 332, 130 N. E. 2d 881; *Douglas v. Teachers' Re-rement Board,* 244 N. Y. S. 2d 173; *State of Washington City of Seattle,* 377 P. 2d 454; *Salz v. State House Com-ission,* 112 A. 2d 716 (N. J.). The application of this well-stablished rule of law to the instant case makes it oundantly clear that the interpretation of the National ffice that the term "salaries" included pensions certainly as most reasonable and fair. Indeed, on the basis of all pplicable legal principles the interpretation of the Na-onal Office, as Judge Danaher found, is irrefutable. But ıe law does not require the union to go so far.

In the instant case the majority below refused to fol-w the rule limiting the Court's authority to determining hether the union's interpretation was reasonable and fair, ıd instead applied a construction to the NMU constitu-on which is an improper interference with the right of e union to conduct its own affairs. To justify its con-usion the majority below referred to the fact that the title Article 14 of the constitution, as amended in 1960 was Compensation of Officers". Since this article contained specific reference to officer pensions, the majority below asoned that when the draftsmen of the 1960 convention shed to refer to pensions, they used the word "compen-tion", and that therefore when the term "salaries" was ed in reference to employees, it was used in a more lim-d sense as not including pensions, notwithstanding the ct that "salaries" in its normal and customary usage in-

cluded pensions,[6] and notwithstanding the fact that "salaries" and "compensation" are synonomous, *Treu v. Kirkwood,* 42 Cal. 2d 602, 268 P. 2d 482; *Spearman v. Williams,* 415 P. 2d 597 (Okla.); *Cook County v. Healy,* 222 Ill. 310, 78 N. E. 623 and both include pensions.

The majority reached its conclusion without citing any supporting authority and without even discussing whether the union's own interpretation was fair and reasonable. It disregarded completely the legislative history and the foregoing case authority.[7] On the other hand, Judge Danaher's strong dissent analyzes the problem point by point and cites the relevant authorities in support.

Judge Danaher's dissent goes to the heart of the problem. A union's constitution should be interpreted so as to accomplish the intent of its membership. The guiding point should be whether the union's actions were fair and reasonable. In refusing to apply this principle to actions under Section 501 of the LMRDA, the majority decision below is in conflict with the decision of the District of Columbia Court of Appeals in *English v. Cunningham, supra,* and the numerous state court decisions previously cited. Certiorari should be granted to resolve this conflict.

---

6. The NMU Officers' Pension Plan includes, at the suggestion of the Internal Revenue Service, all employees of NMU who are not covered by a collective bargaining agreement, which includes a substantial number. Hundreds of thousands of dollars have already been paid out to employees under this plan. In addition, if the decision of the majority be carried out to its logical extreme it would cover all pensions already paid or to be paid to employees under the collective bargaining agreements, because there is no distinction between the employees in the constitution.

7. The effect of the decision will be to make the trustees of the plan liable for the recovery of hundreds of thousands of dollars which have been paid out, despite the finding of the District Judge that the trustees had acted in good faith at all times.

I. The Decision of the Court Below Invalidating the 1969 Amendments to the NMU Constitution Which Specifically Authorized Pensions for Employees Is in Conflict With the LMRDA and Its Legislative History and With the Decision of the Court of Appeals for the Third Circuit in Highway Truck Drivers and Helpers, Local 107 v. Cohen, 284 F. 2d 162, Cert. Den., 365 U. S. 833; and 334 F. 2d 378, Cert. Den., 379 U. S. 921.

Section 501(a) of the LMRDA, after setting forth the nature of the fiduciary duties imposed upon union officials, concludes with the statement:

> ". . . A general exculpatory provision in the constitution and by laws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

The legislative history of Section 501 makes it clear that this provision was directed toward resolutions which purported to relieve union officials from *breaches of trust.* Thus, a distinction was drawn between union actions which were illegal *per se* and union actions which would be legal provided the necessary authority for them was obtained from the union's membership. In House Report No. 741 on H. R. 8342 the prohibition against "exculpatory provisions" was explained as follows: Vol. I, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, pp. 839, 840:

> "However, the committee bill also explicitly invalidates any general provision in a union constitution or bylaws purporting to excuse union officials from *breaches of trust. The bill follows the well-estab-*

lished distinction between conferring authority upon an agent or trustee, which is permissible and protects him against liability, and attempting to excuse breaches of trust, which is here made void as against public policy. See Scott, 'Trusts' (Second Edition) S. 222.1." (Emphasis supplied)

The following excerpts from the debate in the Senate also make it clear that "exculpatory provisions" referred to breaches of trust and did not preclude the ratification of *ultra vires* acts: Vol. II, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1131:

"MR. KENNEDY. I should like to ask the Senator (referring to Senator McClellan) a question. As I understand the provision in his amendment, it refers not to the membership voting to do that which is legitimate so far as union business is concerned, but, rather, to prevent the membership from voting at a meeting, with only a few of the members present, to give excessive payments to a union officer for illegitimate purposes. It is to prevent the misuse of union funds by a majority at a meeting when that majority represents only a very small minority of the membership, and to prevent action which could perhaps involve the enrichment of certain union officers by a surreptitious deal.

"MR. MCCLELLAN. That is, generally, the object of the amendment. I cannot think of every purpose, and I do not know that anyone else can.

"MR. KENNEDY. We are attempting to arrive at some guide points on this subject.

"MR. ERVIN. So far as my personal experience is concerned, I believe this matter is already covered

by law in all the States. I do not share the opinion of the Senator from Arkansas that it is essential to do what he suggests we do. However, I do not see that the provision will do any harm to the bill. I would suggest to the Senator that, in line 6 on page 2, he modify his amendment by striking out 'grant and authority' and insert in lieu thereof 'exculpatory clause or action.'

"MR. MCCLELLAN. What is the Senator's suggestion?

"MR. ERVIN. The suggestion is that the Senator insert, instead, the words 'exculpatory clause or action.'

* * *

"MR. CARROLL. I agree with the Senator from North Carolina (Mr. Ervin). I am sure the Senator from Arkansas had no idea of taking away the rights of members of a union for democratic action such as the right of members to give a grant of authority. As I understand it, the whole purpose of the proposed legislation is to ensure members the right to vote and the right to dictate the policy of the union. I believe the amendment should be accepted. It is very important to establish the fiduciary relationship in this field.

* * *

"MR. MCCLELLAN. I may say that there never was any idea of my trying to curb the authority of the members of a union to do whatever the members want to do; rather, it is my intention to protect the members from having the members of a board or a committee vote to do just about anything they want to do, as has been the case in many instances."

In the instant case the majority below held that the 1969 amendments, which expressly authorized pensions for employees and ratified past pensions already paid, were exculpatory and therefore illegal. In so doing, the majority ignored the language of the Act itself and the distinction in the legislative history between actions which are breaches of trust and therefore illegal per se and actions which may be *ultra vires* of a union's constitution and whose legality depends upon proper authorization from the union membership. In refusing to make this distinction the majority below came into direct conflict with the ruling of the Court of Appeals for the Third Circuit in *Highway Truck Drivers & Helpers Local 107 v. Cohen, supra,* where the question presented was whether Local 107 could pay the legal expenses incurred by certain of its officers in defending criminal charges against them. The Local had passed a resolution authorizing the payment of these legal fees. Certain members of the Local then brought suit contending that this resolution was exculpatory. The District Judge held that the resolution was *not* exculpatory, and said it was necessary to distinguish between a resolution which, while not exculpatory, authorized a union to do something beyond its powers, as against a resolution which sought to relieve an officer for liability for breaches of trust. Such a distinction was necessary lest the "exculpatory provisions" language of Section 501(a) become a mere "catch-all phrase". The District Judge found the resolution invalid because it was beyond the union's constitutional power and because it was inconsistent with the aims and purposes of the LMRDA. He was affirmed by the Court of Appeals. Thereafter, the union amended its constitution to authorize payment of legal expenses incurred by officials in personal criminal proceedings. Relying on this amendment it was contended that payment of the legal expenses was now constitutionally permissible. The District Judge ruled that even though

e payments now were constitutionally allowable they still ere *illegal per se*. The Court of Appeals for the Third rcuit affirmed, stating:

> "Appellants also urge that the 1961 amendment to the International Union's Constitution ratifying the resolution of the Local which approved the payments makes moot plaintiffs' action to set aside those expenditures as *ultra vires*. That abortive attempt to validate the illegal 1959 resolution, could not of course in 1961 legitimatize the 1959 payments which have been held to have been wrongful. And the action of the International was just as inconsistent with Section 501 of the Labor-Management Act as was the Local's ill conceived resolution." (334 F. 2d at 380)

e majority opinion below cites the second sentence that quote as authority for the proposition that Section l prohibited the ratification of an *ultra vires* act. But the ry next sentence clearly shows that the basis for the Third rcuit's decision was that the payment of counsel fees was gal *per se* and inconsistent with Section 501, and not be- se the statute prohibits the ratification of an *ultra vires*

Nowhere in the legislative history is there even the ghtest suggestion that the proscription of "exculpatory visions" was intended to deny unions the right to ratify s of their officers which were not otherwise illegal. As lge Danaher put it, to do so would deny unions the right manage their own affairs.

Under the *Local 107* case, the 1969 amendments clearly re not exculpatory and were perfectly legal. The vast jority of the NMU membership voted in favor of ratify- the past and future pensions. To now interpret Section as prohibiting the NMU membership from amending ir constitution to provide pensions would, contrary to

the legislative intent, defeat union democracy, not promote it.

III. The Decision of the Court Below That Laches Is Not a Defense to the Payment of Union Funds Is an Erroneous Interpretation of Section 501 of the LMRDA in an Area of Major Importance in the Application of the Statute.

The question of laches was raised by defendants in their reply to plaintiffs' motion for summary judgment in which they brought to the court's attention that there was a genuine issue as to material facts relating to laches and other defenses which required a hearing and precluded the granting of summary judgment for plaintiffs (Joint App. 45a-46a). The District Judge, however, held no hearing to ascertain the facts relating to laches, and instead, in granting plaintiffs' motion for summary judgment, merely stated that defendants had not shown that they had been prejudiced by the eight year delay in bringing the action.

On appeal, the majority below, without citing any supporting authority, announced the novel doctrine that laches could *never* be a defense to the improper expenditure of union funds. Thus the majority interpreted Section 501 as requiring that the trustees be held personally liable despite the fact that the payments were not contrary to the statute, but at most *ultra vires,* despite the fact that these payments had been made over an eight year period and publicly reported as required by statute, and despite the fact that there was no question as to the trustees' good faith as found by the District Court (Joint App. 91a). The fallacy of the majority view was clearly demonstrated by Judge Danaher's dissent, as follows:

> "Now, some eight years after the actions we have been discussing, we find these plaintiffs seeking an

accounting and a return of moneys contributed to the Pension Plan. If as the plaintiffs contend on brief these defendants under the judgment will be bound individually to return to NMU all moneys theretofore paid or accrued for the benefit of the intended participants, it is difficult to see why the defendants shall not 'have been prejudiced by the delay.' Surely if this action had earlier been commenced and concluded with like result, it would seem inevitable that the liability so entailed would have been limited. Moreover, corrective action, if really required, could at once have been taken to the end that the Union's concern for eligible participants be satisfied.

"It seems to me that a hearing, at least on this aspect of the case, was clearly in order, I fail to see how the Judge could have faulted the defendants as having 'made no showing that they have been prejudiced by the delay.' To what extent that conclusion by the District Judge entered into his determination that summary judgment was in order, we do not know. But we do know that despite the absence of extrinsic evidence both on this point and with respect to what was in fact the intention of the union, summary judgment for the plaintiffs was directed. If summary judgment were not to be entered in favor of the defendants for the reasons previously advanced, at the very least according to my appraisal of the record here there should have been a hearing. There was error on account of that failure if for no other reason."

Nothing in the legislative history of Section 501 even remotely suggests that Congress intended so radical a departure from established common law principles as the abolishment of the defense of laches. If the decision is

allowed to stand, Section 501 will become a trap for union officials by imposing personal liability on them regardless of the fact that they may have acted in good faith. We submit that this ruling by the Court below is manifest error which should be reversed by this Court.

CONCLUSION.

An important provision of the Labor-Management Reporting and Disclosure Act is involved in these proceedings which deeply affects the rights of unions to govern themselves. The decision of the majority disregards fundamental legal principles on all three of the basic issues, as is clearly demonstrated in the dissenting opinion of Judge Danaher.

Incalculable damage will result to all American unions and their memberships if the majority decision is allowed to stand. We submit that this Petition for a Writ of Certiorari should be granted and the majority's decision reviewed and reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Counsel for Petitioners Joseph Curran, Shannon Wall, William Perry and Abraham E. Freedman.

APPENDIX A.

Memorandum Decision.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

MEMORANDUM

BONSAL, *D. J.*

Plaintiffs are three members of the National Maritime Union of America (NMU); defendants Curran and Wall are elected officers of the NMU; defendant Perry was an employee of the NMU and Assistant to the President; and defendants Segal, Freedman, and Karchmer are trustees of the NMU Officers' Pension Plan (the Pension Plan).

Plaintiffs instituted this action in February 1969. The complaint alleges that defendants allowed the Pension Plan to be amended in 1961, so as to include as participants designated employees of the NMU, who were not elected officers of the NMU (non-officers), in violation of the NMU Constitution then in effect; and that the amendment was designed to siphon NMU funds to the non-officers who were not authorized to receive them. Plaintiffs seek an accounting and money damages from the defendants

responsible; an injunction enjoining the Trustees from paying any benefits to non-officers; and costs, disbursements, and attorneys' fees, under 29 U. S. C. § 501(b).

Defendants Curran, Wall, and Perry (moving defendants) move for an order, pursuant to Rule 12, F. R. Civ. P., dismissing the action; or, in the alternative, for an order, pursuant to Rule 56, F. R. Civ. P., for summary judgment on their behalf. Plaintiffs cross-move for summary judgment as against all defendants.

In 1951, following the amendment of the NMU Constitution, Article 15, entitled "Salaries of Officers," provided, in part, as follows:

> "*Section 1—Salaries and Expenses: The National* Council . . . is empowered, subject to approval of the membership, to set from time to time *the actual salaries* and daily expenses *of all Union officers and employees.*
>
> • • •
>
> *Sec. 8—Pension and Welfare:* The National Council, subject to approval of the membership is empowered to make adequate and appropriate provisions for *pensions,* welfare, and similar benefits *for officers and employees of the Union.*" (Emphasis added.)

On December 29, 1952, an Agreement and Declaration of Trust (the Trust Agreement) was entered into between the NMU and three Trustees, including defendants Segal and Karchmer, granting to the Trustees authority to establish the Pension Plan.

On February 16, 1953, the Trustes promulgated the Pension Plan, which provided that "officers" who had attained a certain age and had credit for a certain number

of years of "covered employment" were eligible to receive pension benefits.*

In 1960, the NMU Constitution was again substantially revised and a new Article 14, entitled "Compensation of Officers," was substituted for Article 15 of the 1951 Constitution.

Article 14 provided, in relevant part:

> "*Section 1—Salaries:* (a) The National Council shall fix the *salaries for all officers of the Union,* subject to approval as provided by this Constitution.
>
> * * *
>
> *Sec. 7—Pensions: All officers shall be eligible for benefits under the NMU Officers' Pension Plan,* subject to such rules and regulations as the Trustees of the Plan may establish." (Emphasis added.)

Article 8, entitled "National Office," was also amended in 1960 to provide that the National Office was "responsible for and shall fix the salaries" of staff personnel of the

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* Relevant provisions of the Pension Plan were as follows:

"ARTICLE II. DEFINITIONS

Section 5. *"Officer"* shall mean a person holding any one of the following offices in accordance with the provisions of the NMU constitution:

(a) National President
(b) National Secretary
(c) National Treasurer
(d) Vice President
(e) National Port Committee Member
(f) Branch Agent
(g) Field Patrolman
(h) Patrolman

* * *

Section 7. *"Covered Employment"* shall mean employment as an officer of the NMU."

NMU, including the non-officers, and shall negotiate collective bargaining agreements for the employees of the NMU.

On October 28, 1961, the Trust Agreement of 1952 was amended so as to make eligible for pension benefits non-officers holding the following positions, and the Pension Plan was amended accordingly:

Assistant to the President
Organizer
Maintenance Supervisor
Bookkeeping Supervisor
Records and Supplies Supervisor
Executive Secretary
Publicity Director
Editor of "The Pilot"

Plaintiffs contend that the defendants violated the 1960 Constitution by allowing non-officers to be included in the Pension Plan. On the other hand, the moving defendants assert that they were acting under their power in Article 8 to fix salaries and bargain collectively for NMU employees; and that this power included the right to provide pension benefits under the Pension Plan for non-officers.

Article 15 of the 1951 Constitution empowered the National Council "to make . . . provisions for pensions . . . for officers and employees of the Union." Article 14 of the 1960 Constitution deleted the word "employees," stating that "All officers shall be eligible for benefits under the [Pension Plan]." Thus, the 1960 Constitution did not continue the authority to include non-officers in the Pension Plan.**

While the term "salaries" may include "pensions," as delayed payments of salary, *Brumley v. Baxter*, 225

** The authority to provide pensions for employees in the 1951 Constitution was not exercised by the NMU. The Pension Plan between 1951 and 1960 included officers only.

N. C. 691, 36 S. E. 2d 281 (1945), see *Inland Steel Co. v. N. L. R. B.*, 170 F. 2d 247 (7th Cir. 1948), *cert. denied*, 336 U. S. 960 (1949), the 1960 Constitution carefully distinguished between the two, using the term "compensation" in the title of Article 14 to encompass "salaries" in section 1 and "pensions" in section 7. In the previous Constitution, the word "salaries" was used in Article 15 to cover both. Moreover, a reading of Article 14 of the 1960 Constitution makes a clear distinction between officers and employees. Thus, section 5, with reference to illness, speaks of "an officer or employee," and section 6, relating to severance pay, again speaks of "an officer or employee," while section 7, dealing with pensions, speaks of "all officers."

Since the 1960 Constitution did not authorize the inclusion of the non-officers in the Pension Plan and it is not denied that funds of the NMU have been paid to the Trustees for disbursal to the non-officers under the Pension Plan, plaintiffs are entitled to relief under 29 U. S. C. § 501.

Plaintiffs argue that they are entitled to summary judgment since the only issue in the case, the construction of the 1960 Constitution, has been resolved in their favor. On the other hand, moving defendants say that there are contested issues as to which of the individual defendants were responsible for the amendment including non-officers in the Pension Plan; whether adoption of the amendment was a breach of fiduciary duty; and whether plaintiffs' action is barred by laches. In addition, defendant Karchmer asserts that he was not timely served by plaintiffs with their cross-motion for summary judgment and that he is not a proper party defendant under 29 U. S. C. § 501.

There is no genuine issue of fact as to the responsibility of the defendants. It is admitted that defendant Curran, as President of the NMU, and defendants Karchmer, Segal, and Freedman, as Trustees of the Pension

Fund, were responsible for authorizing the amendment including the non-officers in the Pension Plan. Defendant Wall, as Secretary-Treasurer, is responsible for the financial affairs of the NMU, and under the 1960 Constitution he and Curran are "directed to pay all obligations incurred by or on behalf of the Union," including payments to the Pension Plan. Defendant Perry, formerly Assistant to the President, was a non-officer who by the amendment was made eligible to receive pension benefits under the Pension Plan.

Under 29 U. S. C. § 501, defendants Curran, Wall, and Perry owe a fiduciary duty to the NMU and its members

> "to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution . . . and . . . to refrain . . . from holding or acquiring any pecuniary . . . interest which conflicts with the interests of such organization . . ."

Defendants Karchmer, Segal, and Freedman owe the same fiduciary duty to the NMU and its members as Trustees of the officers' Pension Plan.

Plaintiffs' action for breach of defendants' fiduciary duties is not barred by laches. The amendment, including the non-officers in the Pension Plan was adopted in 1961, and less than seven years later plaintiffs requested the NMU for an accounting and for a return of moneys contributed to the Pension Plan. In an action based on breach of fiduciary duties, the defense of laches is carefully scrutinized, *Libby v. L. J. Corporation,* 247 F. 2d 78, 82 (D. C. Cir. 1957), and in this case defendants have made no showing that they have been prejudiced by the delay.

Although it appears that plaintiffs did not timely serve their cross-motion for summary judgment, see Rule 56(c), F. R. Civ. P., the court will consider the cross-motion, inas-

much as it could enter judgment for plaintiffs on its own motion, *Bell v. Waterfront Commissioner of N. Y. Harbor,* 183 F. Supp. 175 (S. D. N. Y. 1960), *aff'd,* 279 F. 2d 853 (2d Cir. 1960). See also *Williams v. Howard Johnson's Inc. of Washington,* 323 F. 2d 102, 104 (D. C. Cir. 1965); 6 Moore, *Federal Practice,* ¶ 56.15[6] (2d ed. 1966).

Accordingly, defendant's motion to dismiss plaintiffs' action or, in the alternative, for summary judgment, is denied. Plaintiffs' motion for summary judgment is granted, and judgment will be entered in favor of plaintiffs, directing defendants to account; enjoining defendant Trustees from paying any benefits under the Pension Plan to non-officers; and directing the Trustees to return to the NMU all moneys received by the Trustees for the benefit of non-officers, with interest from the dates the moneys were received. Plaintiffs are entitled to costs, disbursements and attorneys' fees out of the amounts returned by the Trustees to the NMU, in such amounts as may be approved by the court.

Settle order on notice.

Dated: New York, N. Y.
May 23, 1969.

DUDLEY B. BONSAL
U. S. D. J.

APPENDIX B.

Decision and Order on Motion for Reargument.

Defendants' motion for reargument is denied. The interpretation of the meaning of "salaries" sought by defendants would not change the holding that only officers were eligible for benefits under the NMU Officers' Pension Plan, for the reasons stated in the Memorandum filed May 23, 1969. Therefore the inclusion of non-officers in the Plan was not authorized by the NMU Constitution as revised in 1960. Since such inclusion was beyond the power of the defendants, plaintiffs are entitled to appropriate relief.

Consideration has been given to the affidavit of the defendant Martin Segal dated June 11, 1969, which was filed in support of the defendants' motion for reargument. Mr. Segal is one of the trustees of the NMU Officers' Pension Plan, who appeared in the action and filed his answer on May 1, 1969. The court does not question Mr. Segal's good faith as trustee. However, the plaintiffs are entitled to obtain the return to NMU of the monies paid to the Fund on behalf of non-officers since their inclusion was not authorized.

It is so ordered.

Dated: New York, N. Y.
July 3, 1969.

DUDLEY B. BONSAL
U. S. D. J.

APPENDIX C.

Decision and Order on Motion for an Injunction.

The amendments to the NMU Constitution are not exulpatory provisions prohibited by 29 U. S. C. 501. Their urpose is obviously to include non-officer employees in the MU Officers' Pension Plan. According to the Certification f the Honest Ballot Association, dated June 24, 1969, the llowing amendments were adopted by a vote of 10,043 1,685:

"Add the following paragraph to Article 8, Section 11:

(d)—The National Office shall have the authority to provide pensions for all past and present employees of the Union and to protect the pension rights of all past and present employees of the Union.

"Amend Article 14, Section 7 to read as follows:

Pensions: All officers and such employees as the National Office may designate shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish. The National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan."

While it is stated that 12,040 members obtained a ballot, is not stated how many members of NMU were eligible vote. The amendment to Article 14, Section 7 provides at "the National Office shall have the authority to validate troactively all pensions heretofore paid under the Plan." owever, it does not appear that the National Office has ercised this authority.

Plaintiffs' motion is denied, without prejudice to the plaintiffs seeking further relief by appropriate application if the defendants should violate the order of the court.

It is so ordered.

Dated: New York, N. Y.
July 3, 1969.

DUDLEY B. BONSAL
U. S. D. J.

APPENDIX D.

Order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon reading the complaint and the annexed exhibits hereto, the answers of defendants Abraham E. Freedman nd Leon Karchmer, the Notice of Motion of defendants oseph Curran, Shannon Wall and William Perry, ("mov-ng defendants") dated February 27, 1969, for an order, ursuant to Rule 12 of the Federal Rules of Civil Pro-edure, dismissing the complaint, or, in the alternative, or an order, pursuant to Rule 56 of the Federal Rules f Civil Procedure, granting summary judgment on their ehalf, the affidavit of defendant Shannon Wall sworn to n February 27, 1969 and the exhibits attached thereto in upport thereof, the Notice of Cross-Motion dated March 9, 1969 for an order pursuant to Rule 56 of the Federal ules of Civil Procedure, granting summary judgment in avor of plaintiffs, the affidavit of Arthur E. McInerney, sq. sworn to March 18, 1969 in opposition to defendants' otion and in support of plaintiffs' cross-motion, the affi-avit of Charles Sovel, Esq., sworn to March 24, 1969, ubmitted on behalf of moving defendants and in opposition o plaintiffs' cross-motion, the affidavit of Roy L. Reardon, sq., sworn to March 24, 1969 and the exhibit attached hereto submitted on behalf of defendant Leon Karchmer nd in connection with the motion of defendants Joseph urran, Shannon Wall and William Perry and in opposi-

tion to plaintiffs' cross-motion, and the Court having heard oral argument on March 26, 1969 by Charles Sovel, Esq., of counsel to Abraham E. Freedman, Esq., on behalf of moving defendants in support of their motion to dismiss the complaint, or, in the alternative, for summary judgment against the plaintiffs and in opposition to plaintiffs' cross-motion for summary judgment, and by Arthur E. McInerney, Esq., of counsel to Messrs. Duer & Taylor, on behalf of plaintiffs in support of plaintiffs' cross-motion for summary judgment in favor of plaintiffs and in opposition to defendants' motion, and defendants Joseph Curran, Shannon Wall, William Perry, Abraham E. Freedman and Leon Karchmer having been served with process and having appeared by counsel prior to the hearing on said motion and cross-motion on March 26, 1969, and the Court having rendered a decision in writing dated May 23, 1969, and also filed on that day, and the defendant Martin Segal having been served herein, and having filed an affidavit in support of defendants' motion for reargument.

Now, on motion of Simpson Thatcher & Bartlett, attorneys for defendant Leon Karchmer, it is

ORDERED, that defendants' motion to dismiss the complaint, or, in the alternative, for summary judgment, be denied, and it is further

ORDERED, that plaintiff's motion for summary judgment is granted and that the Clerk of the Court enter judgment granting plaintiffs' cross-motion for summary judgment; directing defendants to account; enjoining defendant Trustees from paying any benefits under the Pension Plan to non-officers; and directing the Trustees to return to the NMU all moneys received by the Trustees for the benefit of non-officers, with interest from the dates the moneys were received; and it is further

ORDERED, that plaintiffs be granted costs, disbursements and attorneys' fees out of the amounts returned by the Trustees to the NMU, in such amounts as may be approved by the Court.

Dated: New York, New York
July 11, 1969

DUDLEY B. BONSAL
United States District Judge

Judgment entered 7/18/69

JOHN LIVINGSTON
Clerk

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 309-312—September Term, 1969.

(Argued November 19, 1969 Decided February 20, 1970.)
Docket Nos. 33884, 33918, 33919 and 33937

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Plaintiffs-Appellees-Appellants,

—v.—

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL, ABRAHAM E. FREEDMAN and LEON KARCHMER,

Defendants-Appellants-Appellees.

Before:

LUMBARD, *Chief Judge,*
DANAHER* and ANDERSON, *Circuit Judges.*

Appeals from a denial of defandants' motion for summary judgment and a granting of plaintiffs' cross-motion for summary judgment, but denial of plaintiffs' petition for an injunction, by the United States District Court, Southern District of New York, Dudley B. Bonsal, *Judge,* holding that pension payments made to certain employees of National Maritime Union of America were, under the

* John A. Danaher, Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

Union's constitution, improperly made. Affirmed in part and reversed and remanded in part.

CHARLES SOVEL, Esq., New York, N. Y. (Abraham E. Freedman, Esq., New York, N. Y., on the brief for Defendants Joseph Curran, Shannon Wall and William Perry), *for Defendants-Appellants Curran, Wall, Perry and Abraham E. Freedman.*

ROY L. REARDON, Esq., Simpson, Thacher & Bartlett, New York, N. Y., *for Defendants-Appellants Martin E. Segal and Leon Karchmer.*

ARTHUR E. MCINERNEY, Esq., New York, N. Y. (Duer & Taylor, New York, N. Y., on the brief), *for Plaintiff-Appellees.*

ANDERSON, *Circuit Judge:*

This case arises under § 501 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 501 (1964), and concerns the propriety of certain payments made into the Officers' Pension Fund of the National Maritime Union (NMU). The plaintiffs, James M. Morrissey, Joseph Padilla, and Ralph Ibrahim, have been members in good standing of the NMU since approximately 1950. The defendant Joseph Curran is the national president and the defendant Shannon Wall is the national secretary-treasurer of the NMU, both elective positions. The defendant William Perry is the recently retired assistant to the president of the Union, a non-elective position. The defendants Abraham E. Freedman, Martin E. Segal, and Leon Karchmer are the trustees of the NMU Officers' Pension Plan.

The structure of the NMU and the powers and duties of its officers and various internal governing bodies are set

out in the Union's constitution. It makes provision for three governing units which have nation-wide jurisdiction. The ultimate authority is vested in the National Convention, which meets triennially and is composed of the elected delegates from various ships and ports. When the National Convention is not in session, the Union is governed by the National Council, which holds regular annual meetings and consists of the elected national officials and certain other delegated representatives. When the National Council is not in session, governing authority rests in the National Office, made up of the national president, secretary-treasurer, three vice presidents, and three national representatives. This body is primarily responsible for the day to day, internal administration of NMU affairs.

In 1951 the NMU constitution was amended to permit the National Council, subject to membership approval, to provide pension benefits for all NMU officers and employees.[1] On December 29, 1952, pursuant to this authority, the National Council entered into an Agreement and

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1. The pertinent provisions of the 1951 NMU constitution read as follows:

"ARTICLE 15 SALARIES OF OFFICERS

SECTION 1—SALARIES AND EXPENSES: The National Council, considering the financial state of the Union, is empowered, subject to approval of the membership, to set from time to time the actual salaries and daily expenses of all Union officers and employees.

The National Council shall pay all salaries, approved by the membership, of all Union officers and employees. . . .

* * *

SEC. 8—PENSION AND WELFARE: The National Council, subject to approval of the membership is empowered to make adequate and appropriate provisions for pensions, welfare, and similar benefits for officers and employees of the Union."

Between the 1951 amendment to the constitution and 1960 pension plans were adopted for the employees pursuant to collective bargaining agreements.

Declaration of Trust with three trustees which gave them the authority to establish a pension plan. On February 16, 1953, the trustees adopted a plan whereby pension rights accrued to the various elected officials of the Union, including the president, secretary, treasurer, vice-president, national port committee member, branch agent, field patrolman, and patrolman. No non-elected employee of the Union was included under its coverage. The majority of the administrative employees of the NMU were represented by this or other unions in their employment relationship with the NMU and had been granted pension rights, as permitted by the 1961 NMU constitution, as a part of their respective collective bargaining agreements.[1a]

On October 28, 1961, the National Office (as opposed to the National Council) authorized an amendment to the Agreement and Declaration of Trust, the effect of which was to extend its coverage to certain executive and supervisory employees of the Union who held appointive rather than elective positions, such as the assistant to the president, organizer, executive secretary, publicity director,

1a. The last sentence of Article 8(a) of the 1960 constitution which concerns technical, clerical and administrative personnel attached to or under the National Office, provides:

"Whenever possible, such employees shall be members of the NMU or of appropriate AFL-CIO affiliates."

With nothing shown to the contrary, it may be assumed that all of the few non-elected employees, arbitrarily brought under the Officers' Pension Plan by the National Office, already had pension coverage under collective bargaining agreements applicable to them. It must be emphasized that the present case nothing whatever to do with such pension coverage, nor do the plaintiff in any way challenge or seeks to disturb those pension rights of the administrative employees. Rather, in the present action, they are questioning only the awards to the special few non-elected employees who have been granted the lucrative "pension rights" under the Officers' Pension Plan. For example, one of these special employees, the defendant Perry, who incidentally already had coverage under the NMU Deep Sea Pension Plan, resigned as assistant to the president, January 16, 1969, and, as a specially created beneficiary received over $100,000 under the Officers' Pension and Plan alone.

editor of the Pilot (the union house organ), and supervisors over maintenance, bookkeeping, records and supplies.[2]

Prior to the adoption of the amended Declaration of Trust, however, the NMU constitution had been subjected to an extensive revision whereby, along with other changes, the authority vested in the National Council to fix the salaries of certain employees was shifted to the National Office and the requirement for membership approval thereof was deleted.[3] This revision became effective on December 2, 1960.

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2. Three years later, in 1964, the Officers' Pension Plan was again extended to include additional administrative personnel not covered by collective bargaining agreements.

3. The amendment applicable to this case read, in pertinent part, as follows:

"ARTICLE 8 NATIONAL OFFICE

* * *

SEC. 11—EMPLOYEES OF THE UNION: (a) The National Office shall be responsible for and shall fix the salaries of all technical, clerical, and administrative personnel as may be required for the effective administration of the Union's affairs. Wherever possible, such employees shall be members of the NMU or of appropriate AFL-CIO affiliates.

(b) Collective bargaining agreements affecting employees of the NMU shall be negotiated by the National Office or such officer or officers as it may designate; provided that no such agreements shall be made without specific approval by the National Office."

"ARTICLE 14 COMPENSATION OF OFFICERS

Section 1—Salaries: (a) The National Council shall fix the salaries for all officers of the Union, subject to approval as provided by this Constitution.

* * *

Sec. 7—Pensions: All officers shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish.

Sec. 8—Welfare: All officers shall be eligible for benefits under the Officers' Welfare Plan. The National Council, subject to membership approval, is empowered to improve the benefits under said Plan."

The plaintiffs contend that the 1961 amendments to the Declaration of Trust, by the National Office, permitting benefits to be paid to non-elected employees under the Officers' Pension Plan were not authorized by and were in contravention of the NMU constitution, as amended in 1960. After Union officials refused to take any action, as requested, to obtain the return or funds paid into the Trust fund for the benefit of non-elected employees under the revised Plan, the plaintiffs filed a complaint in the district court seeking an accounting, a money judgment for any damages suffered by the Union or the Trust fund, and an injunction against further payments to non-elected employees.

On February 4, 1969, the district court (Bryan, *Judge*) granted leave, pursuant to 29 U. S. C. § 501(b), to commence this action. Defendants Curran, Wall and Perry moved to dismiss the complaint under Rule 12(b)(5), F. R. Civ. P., or in the alternative for summary judgment under Rule 56. The plaintiffs filed a cross-motion for summary judgment against all defendants. Oral argument was heard on both motions on March 26 (Bonsal, *Judge*), and on May 23 the defendants' motions were denied and plaintiffs' cross-motion was granted. 302 F. Supp. 32 (S. D. N. Y. 1969). The court held that the defendants should account for and repay pension funds accrued and paid to non-elected Union employees, that the defendant trustees should be enjoined from paying out of the Officers' Pension Plan fund further benefits to non-officers and the plaintiffs should recover costs and attorneys' fees.

Immediately following the district court decision, the National Council of the Union convened and proposed amendments to the constitution which gave the National Office of the NMU the authority, which the trial court had found it did not have under the 1960 amended constitution, to designate certain non-elected employees to be eligible

for benefits under the Officers' Pension Plan as well as the authority "to validate retroactively all pensions heretofore paid under the plan." The approval of these amendments was voted on June 24, 1969. The plaintiffs promptly moved to have the June 24th amendments declared invalid as exculpatory, and therefore void, under § 501(a)[4] and to enjoin any implementation of them. The relief sought was denied without prejudice on July 3, 1969. The defendants moved that the entire action be dismissed as moot on the ground that the new amendments removed any question of the power of the defendants to act as they did.

Meanwhile, on June 2, 1969, defendants Curran, Wall and Perry filed a motion for reargument of the May 23 decision. On June 6 the plaintiffs filed a motion to enjoin the defendants from being represented by counsel retained by the Union, to require defendants to pay their own counsel from funds not belonging to the Union, and to enjoin the implementation of the proposed amendments to the NMU constitution on the ground that they were exculpatory and therefore void under 29 U. S. C. § 501(a). On June 11 a motion for reargument was filed on behalf of defendants Segal and Karchmer. In separate orders entered on July 3, 1969, these motions were denied, except for the motion relating to representation of defendants by Union counsel, which was not ruled upon.

The defendants have appealed from the district court decision granting summary judgment to the plaintiffs, denying their own similar motion and their motions for reargument. The plaintiffs have filed an interlocutory ap-

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4. The pertinent language of the statute provides:
". . . A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

eal from the trial court's denial of their motion to declare nvalid and enjoin the use of the June 24 amendments to ne NMU constitution. The major dispute on these appeals oncerns the proper interpretation of the provisions for stablishing employee pension funds under the 1951 NMU onstitution, as amended in 1960.

Defendants argue that the 1960 amendments were de-igned to shift the responsibility for the establishment of mployee salaries from the National Council to the Na-ion Office and did not limit in any way the power of the Iational Office to establish employee pension funds. They ssert that the terms "salaries," as used in Article 8, § 11, nust be construed to include pensions, from which they laim it follows that the National Office was acting within s authority when it amended the Officer's Pension Plan n 1961. In support of this position they rely upon such ases as *Brumley v. Baxter,* 225 N. C. 691, 36 S. E. 2d 281 1945), and *Giannettino v. McGoldrick,* 295 N. Y. 208, 66 . E. 2d 57 (1946), which hold that pensions are compensa-ion for past services as opposed to gratuities, and in that ense, are included within the term "salary." But as the istrict court pointed out in its opinion, the framers of the MU constitution, when drafting the 1960 revision, clearly ad in mind a distinction between salaries and pensions, s evidenced by the use of the term "compensation" in rticle 14 to include both types of remuneration. The NMU onstitution, as amended in 1960, was clear and explicit ith regard to the persons covered by the pension pro-isions, and in the light of the history, context and wording f those provisions, the district court's rejection of the efendant's claim is correct. There was no genuine issue f material fact concerning the charge of a breach of duty n the part of the defendants, and summary judgment in avor of the plaintiffs should be affirmed.

In support of their claim that the 1969 amendments [5] to the NMU constitution, made immediately following the district court decision, are exculpatory and that their application should be enjoined, the plaintiffs rely on *Highway Truck Drivers and Helpers Local 107 v. Cohen,* 182 F. Supp. 608 (E. D. Pa.), *aff'd,* 284 F. 2d 162 (3 Cir. 1960), *cert. denied,* 365 U. S. 833 (1961), and *Highway Truck Drivers and Helpers Local 107 v. Cohen,* 215 F. Supp. 938 (E.D. Pa. 1963), *aff'd,* 334 F. 2d 378 (3 Cir.), *cert. denied,* 379 U. S. 921 (1964). In the first of these two cases the district court found that it was improper for the local union to pay the attorney fees of union officers who were under criminal indictment. These fees were to be paid pursuant to a resolution of the local which permitted such payment, and that resolution was declared invalid because it authorized "action beyond the powers of the union as derived from its constitution and was inconsistent with the aims and purposes of the Labor-Management Reporting and Disclosure Act." 284 F. 2d at 164. The international union then amended its constitution to permit such authorizations. Thereafter in the second *Cohen* case the union officers claimed that the payments were valid as the amendment purported to be retroactive. In rejecting this claim the Third Circuit said:

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5. The following is the full text of those amendments:

"Amend Article 8, Section 11 to add the following paragraph:
The National Office shall have the authority to provide pensions for all past and present employees of the Union and to protect the pension rights of all past and present employees of the Union.

Amend Article 14, Section 7, as follows:

Sec. 7—Pensions: All officers and such employees as the National Office may designate, shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish. The National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan."

"That abortive attempt to validate the illegal 1959 resolution, could not of course in 1961 legitimatize the 1959 payments which have been held to have been wrongful. And the action of the International was just as inconsistent with Section 501 of the Labor Management Act as was the Local's ill conceived resolution." 334 F. 2d at 381.

The defendants in the present case, however, assert that ne cases cited actually support the defense. It is their ontention that the trial court held in the 1960 *Cohen* case nat a resolution authorizing an expenditure of union funds as not an exculpatory provision in violation of § 501(a) nd, in the 1963 *Cohen* case, that a constitutional amend- ent authorizing expenditures already incurred was not xculpatory unless the expenditures themselves were in iolation of § 501 of the Act. Turning to the present case ney argue that the court below did not find that the pay- ents into the Officers' Pension Plan for the benefit of mployees were per se violative of § 501(a), and therefore ny subsequent constitutional provision purporting to alidate the past payments cannot be exculpatory within ne meaning of § 501(a). In making this assertion, the efendants conveniently overlook the fact that the trial ourt did find that they had breached their duties because ne expenditures in question were not authorized by the MU constitution and that they were in violation of § 501 f the Act. In the *Cohen* cases the trial court was affirmed ecause the local union authorized actions beyond its owers as derived from the constitution and because its ffort to pay attorneys' fees for officers who had been erelict in their duties was "inconsistent with the aims and urposes of the Labor Management Reporting and Dis- osure Act." We agree with the position taken by the hird Circuit. Otherwise the provisions of § 501 would be ompletely emasculated if, every time a court, at the behest

of complaining members of a union, found that the officers had breached their duties, the officers could find sanctuary by putting through a constitutional amendment or by-law retroactively to legitimatize their former derelictions of duty.

The defendants also argue that the district court "has not imposed any personal liability upon the defendants from which they needed to be 'exculpated,' " but we do not agree with this argument. The district court ordered the defendants to account for all moneys paid into the Officers' Pension Plan and return to the NMU all moneys received by the trustees for the benefit of non-officers with interest. It follows that if they are unable to recoup that money, they may be held personally liable.

The trial court's decison, however, on the plaintiffs' motion for an injunction, that the purpose of the 1969 amendments to the NMU constitution was to include non-officer employees in the NMU officers' pension plan and that the amendments were, therefore, not exculpatory provisions prohibited by § 501, is at odds with its holding that there was an obvious breach of duty on the part of the defendants in causing union funds to be paid out to persons who were not entitled to them. His conclusions might have been correct if the provisions were prospective only in their application but the amendment to Article 14, § 7 provides in part: "the National Office shall have the authority to validate retroactively all pensions heretofore paid under the plan." This is clearly exculpatory in intent and language. The NMU exercised its authority under the 1969 amendments to attempt to validate retroactively all the pensions previously paid. The determination that the 1969 amendments were not exculpatory is reversed and will be reconsidered on remand.

The defendants raise a number of additional minor issues, several of which will be commented upon. They

ave throughout pressed the defense of laches. But the natter of improper payments of union funds to persons ot entitled to them is a continuing offense and cannot bar n injunction to prevent continued payments or an account- ng for all of the unlawful expenditures.

The defendants Segal and Karchmer claim that the ltimate order issued by Judge Bonsal exceeded the ourt's jurisdiction because it is their contention that the ourt's jurisdiction is fixed by the order issued by Judge Bryan on plaintiffs' application for leave to bring suit on ebruary 4, 1969. This is an incorrect interpretation of 501(b). The purpose of requiring permission to bring an ction is a safeguard to protect the union officers from exatious suits and once given is not to be treated as a tricture on jurisdiction. *Horner v. Ferron,* 362 F. 2d 224, 28 (9 Cir.), *cert. den.* 385 U. S. 958 (1966). An issue was lso raised that Judge Bonsal had no power to grant ummary judgment on plaintiffs' motion because of in- dequacy of notice to some of the defendants. The trial ourt, however, had power on its own motion to enter ummary judgment against the party who was the original lover. 6 Moore, Federal Practice, ¶ 56.12 at 2241 (2d ed. 966). While some of the defendants had only a brief pportunity to prepare for the argument on the plaintiffs' notion, there is nothing whatever to indicate that any party as at all prejudiced. *Stein v. Oshinsky,* 348 F. 2d 999, 000-01 (2 Cir.), *cert. den.* 382 U. S. 957 (1965).

Defendants also argue that the trustees of the Officers' ension Plan do not come within the definition of those aving a fiduciary responsibility as set forth in 29 U. S. C. 402(q). This court has specifically rejected this claim in *ucker v. Shaw,* 378 F. 2d 304, 308 (2 Cir. 1967). The trial ourt was correct in finding that all of the defendants were a position of trust and responsibility in relation to the onies charged to have been unlawfully expended and all

had a duty to see that it was restored to the Union treasury.

The remaining points raised by the defendants do not merit discussion.

We affirm denial of the defendants' motion for summary judgment and the entry of summary judgment in favor of the plaintiffs. As the June 24, 1969, amendments to the NMU constitution are clearly exculpatory as prohibited by § 501(a), we reverse the denial of plaintiffs' motion to have these amendments declared void, and remand to the district court for appropriate action declaring the amendments to be without effect and enjoining defendants from acting in reliance upon them. As the district court apparently did not pass on so much of plaintiffs' motion as requested that defendants be enjoined from retaining counsel paid or to be paid with Union funds, this question should also be determined on remand. The controlling cases on this point are *Tucker v. Shaw, supra,* and *Holdeman v. Sheldon,* 311 F. 2d 2 (2 Cir. 1962), in which we held that all that is necessary for enjoining of the defendants in a § 501 action is that the plaintiff make "a reasonable showing that he is likely to succeed." We also note that the district court maintains continuing jurisdiction to insure that the accounting and return of funds to the Union treasury proceed as ordered, and, of course, it retains the power to issue the necessary orders to assure full compliance.

Affirmed in part, reversed in part, and remanded for further proceedings in compliance with this opinion.

DANAHER, *Senior Circuit Judge* (dissenting):

Although according great respect for the views of my colleagues and for those of the able District Judge, Honor-

able Dudley B. Bonsal, I nonetheless fear that error has occurred.

The National Maritime Union of America (hereinafter NMU) was founded in 1937. Some fourteen years later, the still-young Union adopted a Constitution which, so far as is here pertinent, provided that "considering the financial state of the Union," the Union's National Council [1] was empowered to make adequate and appropriate provisions for pensions, welfare and similar benefits for officers and employees of the Union. That power was never rescinded, I suggest, but was later transferred to the National Office.

Agreeably to such authorization, effective as of February, 1953, the NMU Officers' Pension Plan was adopted, then covering all elected officers of NMU. There has been no challenge here to the validity of that Plan.

NMU in the management of its properties, in the administration of its far-flung business and in furtherance of its purposes, utilized the services of a staff of lawyers, economists, pension administrators, staff experts in Washington, doctors, and supervisory staffs of Union-owned real estate.[2] For their protection as well as to further its own interest in their retention in its service, NMU negotiated with various unions of which its employees were members for the establishment of pension and welfare plans. As an employer, NMU was bound to bargain respecting hours, wages and conditions of employment. Although clearly authorized to do so, NMU had not until the events here

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1. The National Council was authorized to act between National Conventions. Another entity, known as the National Office, was accorded the same powers as those reposed in the National Council, to be exercised in the more frequent meetings of the National Office.

2. Some inkling of the nation-wide scope of the operations of NMU may be gleaned from the carefully-detailed findings of District Judge Motley outlined in *Wirtz v. National Maritime Union of America*, 284 F. Supp. 47 (S. D. N. Y. 1968); *affirmed* by this Court 399 F. 2d 544 (1968).

at issue, set up a separate plan for a few of its supervisory personnel, not elected officers and not represented by some union.

Some sixteen years after the original Plan had become effective, the plaintiffs here alleged that without authorization a lump-sum benefit[3] had been accorded to the defendant Perry following his resignation as Executive Assistant to the National President. Purporting to base the action upon 25 U. S. C. § 501, the plaintiffs had sought an accounting, a money judgment against the defendants, and an injunction to restrain the Trustees from paying benefits to Perry or any other non-elected employees of NMU. The Union was not made a party. Under date of May 23, 1969, the District Judge filed an Opinion holding, compendiously, that there was no authority[4] for covering non-employees into the Plan, and so he granted summary judgment for the plaintiffs. He ordered the defendants to account; enjoined the Trustees from paying benefits under the Plan to non-officers; and further directed the Trustees to return to NMU, with interest, all moneys received by the Trustees for the benefit of non-officers.

I.

Meanwhile, Congress adopted the "Welfare and Pension Plans Disclosure Act," effective as of January 1, 1959,[5] which defined an "employee pension benefit plan" to mean

3. The original Plan had specifically provided that the Trustees in their discretion might make a lump-sum payment in lieu of benefits otherwise provided. Indeed, the authorization was amended and extended in 1958.

4. There was no evidence that the officer defendants or the Trustees personally benefited in any way or otherwise acted unlawfully, or that they had exercised bad faith. Cf. *Bakery and Confectionery Workers Internat'l U. v. Ratner,* 335 F. 2d 691 (1964).

5. 29 U. S. C. A. § 301 et seq., PL 85-836, as amended by PL 87-420, 76 Stat. 35, which vastly increased the authority of the Secretary of Labor to supervise and to administer the disclosure requirements of the earlier Act.

"any plan, fund or program which is communicated or its benefits described in writing to the employees, and which was heretofore or is hereafter established by an employer or by an employee organization, or by both, for the purpose or providing for its participants . . . retirement benefits . . . ."

And the Act further defined the term "participant" to mean

"any employee or former employee of an employer or any member of an employee organization who is or may become eligible to receive a benefit of any type from an employee welfare or pension benefit plan . . . ."

NMU became bound to submit annually to the Secretary of Labor a report describing the Plan, an annual financial statement, and further information in such form and detail as the Secretary might prescribe. NMU complied with those requirements.[6]

So it was in part, and with the Labor Management Reporting and Disclosure Act of 1959 (LMRDA)[7] by this time on the statute books, the 1951 Constitution was revised at an NMU Convention held in October, 1960, with ratification by the membership after a referendum vote concluded in December of 1960.

I deem it unthinkable that the NMU membership supposed for a moment that the amended Constitution was intended to wipe out whatever rights to coverage had been acquired since 1952. There was no repealer clause in the 1960 revision. To me, it is inconceivable that the eligibility established in 1952, followed by good faith reliance under

6. 29 U. S. C. A. §§ 304-307. NMU furthermore was bound o report in detail to the Bureau of Internal Revenue and annually lid so.

7. 29 U. S. C. A. § 401 et seq.

the express terms of the earlier Constitution, was to be deemed obliterated. I reject the suggestion that the Constitution, as revised, had narrowed the authority of this Union to provide pensions for any of its 47,000 members, whether they be elected officers or employees or whatever their status.

On the contrary the 1960 Constitution even broadened benefits to be accorded to members whose rights had previously accrued, as for example where Article 15, Section 8(f), specified that members

> "receiving a monthly pension under the NMU Welfare and Pension Plan or the NMU Officers' Pension Plan shall not be required to pay dues and shall be regarded as honorary members . . . ."

Against such background, lacking representation by any employee union and not possessing the status of elected officers, a few non-elected employees were brought into the Plan. Perry as Assistant to the President[8] was included, certain others being identified as Organizer, Maintenance Supervisor, Bookkeeper Supervisor, Records and Supply Supervisors, Executive Secretary, Publicity Director and the Editor of the NMU official News Organ, The Pilot.

In sum, my reading of the record and my construction of the NMU Constitution convince me, first, that it had always been the plain intendment of this Union that pensions for both officers and employees be authorized; and next, that the power to establish any plans had been created in 1951, with continuing authorization to amend whatever

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8. The Constitution in Article 13, Section 1, provided as to the National President that:

> (f) He may, in his discretion, and at such salary as the National Office may determine, appoint a member, or members, of the Union to assist him in the exercise of his administrative functions; provided that such assistant or assistants shall at no time act in an executive capacity.

plan might thereupon be established. See, for example, Article 15, Section 8 of the Constitution, ratified in 1951, which read:

> The National Council, subject to approval of the membership, is empowered to make adequate and appropriate provisions for pensions, welfare, and similar benefits for officers and employees of the Union.

Nothing to be discerned from the revised Constitution, ratified December 2, 1960, detracted one whit from that authority. Rather, I suggest, the later revision must be read with the former. The only difference in giving effect to the continuing intent of the Union membership was that after the 1960 revision, the authority to act was transferred from the National Council to the National Office. I conclude that even without more than my analysis suggests, the District Judge erred in concluding that at the time the challenged action was taken, there had been a lack of authority to provide pensions for all past and present employees of the Union.

II.

But there was more. After the release of Judge Bonsal's May 23, 1969 Opinion, the Union promptly took steps to reiterate the NMU intention. If the judge could be heard to say the NMU had failed to make clear its intention, two amendments to the Constitution were immediately proposed. The amendments by referendum were forthwith approved by the membership by an overwhelming vote. Accordingly, the revised 1960 Constitution was further amended by the addition to Article 8, Section 11, of the following:

> (d)—The National Office shall have the authority to provide pensions for all past and present employees

of the Union and to protect the pension rights of all past and present employees of the Union.

The membership further amended Article 14, Section 7, to read as follows:

> Pensions: All officers and such employees as the National Office may designate shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish. The National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan.

These plaintiffs then attacked the amendments as "exculpatory" within the meaning of 29 U. S. C. § 501, and they sought an injunction. The District Judge flatly—and correctly—rejected that contention and ruled that the amendments "were not exculpatory provisions prohibited by 29 U. S. C. § 501. *Their purpose is obviously to include non-officer employees in the NMU Officers' Plan.*" (Emphasis added.)

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9. Decision and Order on Motion for an Injunction

The amendments to the NMU Constitution are not exculpatory provisions prohibited by 29 U. S. C. 501. Their purpose is obviously to include non-officer employees in the NMU Officers' Pension Plan. According to the Certification of the Honest Ballot Association, dated June 24, 1969, the following amendments were adopted by a vote of 10,043 to 1,685:

"Add the following paragraph to Article 8, Section 11:

(d)—The National Office shall have the authority to provide pensions for all past and present employees of the Union and to protect the pension rights of all past and present employees of the Union.

"Amend Article 14, Section 7 to read as follows:

Pensions: All officers and such employees as the National Office may designate shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish. The National

Granting that the Constitution had validly been amended, the District Judge's July 3, 1969 Memorandum observed, "It does not appear that the National Office has exercised this authority."

I read him to be saying, "I do not perceive that the necessary authority existed to include non-officers at the time they were covered into the Plan. But now NMU has conferred that authority. Even so as of this moment, the National Office has not so far exercised its power." And accordingly he concluded *only* that since the inclusion of non-officers "was beyond the power of the defendants, plaintiffs are entitled to appropriate relief." [10]

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9 (cont'd)
Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan."

While it is stated that 12,040 members obtained a ballot, it is not stated how many members of NMU were eligibile to vote. The amendment to Article 14, Section 7 provides that "the National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan." However, it does not appear that the National Office has exercised this authority.

Plaintiffs' motion is denied, without prejudice to the plaintiffs seeking further relief by appropriate application if the defendants should violate the order of the court.

It is so ordered.

Dated: New York, N. Y.
July 3, 1969.

DUDLEY B. BONSAL
U. S. D. J.

10. DECISION AND ORDER ON MOTION FOR REARGUMENT

Defendants' motion for reargument is denied. The interpretation of the meaning of "salaries" sought by defendants would not change the holding that only officers were eligible for benefits under the NMU Officers' Pension Plan, for the reasons stated in the Memorandum filed May 23, 1969. Therefore the inclusion of non-officers in the Plan was not authorized by the NMU Constitution as revised in 1960. Since such inclusion was beyond the power of the defendants, plaintiffs are entitled to appropriate relief.

Consideration has been given to the affidavit of the defendant Martin Segal dated June 11, 1969, which was filed in support of the defendants' motion for reargument. Mr. Segal is one of the trustees of the NMU Officers' Pension Plan, who appeared in the action and

Thereupon after such prompting, as the record shows, the National Office acted to implement the authority so recently reaffirmed. It adopted a resolution based upon the desire of the National Office "to confirm the pension rights of all employees of the Union, both retroactively and prospectively." The text appears in the margin.[11]

Right then and there, having been advised in the premises, the assumed omission having been cured by NMU, the

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10 (cont'd)
filed his answer on May 1, 1969. The court does not question Mr. Segal's good faith as trustee. However, the plaintiffs are entitled to obtain the return to NMU of the monies paid to the Fund on behalf of non-officers since their inclusion was not authorized.

It is so ordered.

Dated: New York, N. Y.
July 3, 1969.

DUDLEY B. BONSAL
U. S. D. J.

11. "Now, Therefore be it Resolved:

(1) All pensions heretofore paid by the NMU Officers' Pension Plan are hereby validated and approved.

(2) All employees of the Union except (a) those already covered by collective bargaining agreements where the NMU is the employer, which collective bargaining agreements provide for the covered employees . . . shall be eligible for benefits under the NMU Officers' Pension Plan.

(3) Payments on the NMU Officers' Pension Plan to provide for the foregoing benefits are hereby authorized and all past payments by the Union to the NMU Officers' Pension Plan are hereby ratified and approved."

Pursuant thereto, the Plan (identified as that which was "effective as of February 16, 1953," as amended) was again amended in Article I, Section 8 to define, more specifically, the term "Participant" to mean

"an Officer, Representative, Supervisor or Professional, and all other employees of the Union except (a) any employee whose compensation, hours of work or conditions of employment are determined by collective bargaining with a recognized bargaining agent . . . ."

And Section 9 defines "NMU Constitution" to mean

"the Constitution of the NMU in force and effect at the time of the adoption of this Pension Plan [1953] together with any amendments thereto."

District Judge should have entered summary judgment in behalf of the *defendants,* thus rendering moot whatever claims had previously been urged upon the Court by these plaintiffs. To take any other view, as it seems to me, is not only to deny NMU its right to manage its own affairs,[12] but in view of the rectification of whatever oversight the Judge thought he had detected, the membership clearly restated its approval of the authority of the National Office and of the Trustees to provide pensions for all officers and all employees.[13]

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12. The Supreme Court has recognized that unions in the view of Congress are to be accorded great latitude in resolving their own internal controversies. *Wirtz v. Bottle Blowers Assn.,* 389 U. S. 463, 471, text, n. 10 (1968); cf. *Wirtz v. Hotel Employees,* 391 U. S. 492, 497 (1968).

13. Applying to the documents before us principles analogous to those governing statutory construction, we are bound to read them together. Certainly repeals by implication are not favored, and nowhere can it be seen that the 1960 Constitution repealed the earlier version. Where thre are two acts upon the same subject, it is fundamental that the rule is to give effect to both if possible. *United States v. Borden,* 308 U. S. 188, 198 (1939).

The language before us must be interpreted in the light of reason and understanding to reach the results intended bythe NMU's Conventions and the respective Constitutions which reflect the membership approval. *Rathbun v. United States,* 355 U. S. 107, 109 (1957); cf. *United States v. Public Utilities Comm'n,* 345 U. S. 295, 315 (1953).

If caution "against a literal reading of congressional legislation" be required, *Wirtz v. Bottle Blowers Assn., supra,* at 468, how much more so should that caution be applied to the language, often enough inartful, as employed by the Union's draftsmen. Recognition of the *general objectives* sought to be achieved by NMU should provide the key to a reconciliation of all alleged doubts.

This was no case where officers of the Union were misappropriating Union funds for themselves. Cf. *Tucker v. Shaw,* 378 F. 2d 304, 306 (2 Cir. 1967); indeed, the Judge found no lack of good faith on the part of the trustees, cf. *Coleman v. Brotherhood of Railway & Steamship Clerks, Etc.,* 340 F. 2d 206, 209 (2 Cir. 1965). Here, the Union officers, the National Office, the NMU membership and the trustees had undertaken to do precisely what the Union ought to accomplish.

The purpose and the intent of the Union emerged conclusively, I respectfully submit, and the conferred authority was exercised.

III.

Having in mind that the District Judge concluded that summary judgment was in order, perhaps it will not be amiss to turn back to his May 23, 1969 Memorandum Decision. There he concluded that the "plaintiffs' action for breach of defendants' fiduciary duties is not barred by laches." He continued that "in this case defendants have made no shownig that they have been prejudiced by the delay."

Judge Motley found in *Wirtz v. National Maritime Union of America,* 284 F. Supp. 47, 53 (1968), that the defendant Wall in the 1966 contest for National Secretary-Treasurer had defeated the plaintiff Morrissey by a vote on the order of two to one. The plaintiff Padilla received the least number of votes and by about the same ratio as he sought election as one of the Vice-Presidents. These plaintiffs then had filed protests, *id.,* 57, in accordance with the provision of the Constitution, and after their protests had been heard and rejected they sought the intervention of the Secretary of Labor. They did not do so here, and it may be noticed that the Secretary is not complaining concerning the present issue,[14] although he had been kept informed through the annual filing of the reports required by the Disclosure Acts.

Now, some eight years after the actions we have been discussing, we find these plaintiffs seeking an accounting and a return of moneys contributed to the Pension Plan. If

14. In passing it should be noted that the Internal Revenue Service had required NMU to amend the Plan so as to cover broadly *all* employees, officers, as well as non-officers. Thereupon, the Plan, so amended, was approved by the Bureau of Internal Revenue.

ıe plaintiffs contend on brief these defendants under udgment will be bound individually to return to NMU ıoneys theretofore paid or accrued for the benefit of ntended participants, it is difficult to see why the deants shall not "have been prejudiced by the delay." ly if this action had earlier been commenced and con-ed with like result, it would seem inevitable that lia-y so entailed would have been limited. Moreover, cor-ve action, if really required, could at once have been n to the end that the Union's concern for eligible par-ants be satisfied.

It seems to me that a hearing, at least on this aspect e case, was clearly in order. I fail to see how the Judge l have faulted the defendants as having "made no ving that they have been prejudiced by the delay." To extent that conclusion of the District Judge entered his determination that summary judgment was in r, we do not know. But we do know that despite the nce of extrinsic evidence both on this point and with ect to what was in fact the intention of the Union, mary judgment for the plaintiffs was directed.[15] If mary judgment were not to be entered in favor of the *ndants* for the reasons previously advanced, at the least according to my appraisal of the record here e should have been a hearing. There was error on unt of that failure if for no other reason.

IV.

It would unduly protract this exposition of my views e I to go int further detail. Sounding again the note vhich I opened, I respectfully submit my observations the greatest regard for those of my colleagues and ge Bonsal.

15. Cf. *United States v. Diebold, Inc.*, 369 U. S. 654, 655 2).

APPENDIX F.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of February, one thousand nine hundred and seventy.

Present: HON. J. EDWARD LUMBARD,
Chief Judge,

HON. JOHN A. DANAHER,

HON. ROBERT P. ANDERSON,
Circuit Judges.

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE NATIONAL MARITIME UNION OF AMERICA,
Plaintiffs-Appellants,

v.

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL, ABRAHAM E. FREEDMAN AND LEON KARCHMER,
Defendants-Appellants,

(AND 3 OTHER CASES).

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, lged, and decreed that the orders and judgment of said ict Court be and they are hereby affirmed in part and sed in part and that the action be and it hereby is re-led for further proceedings in compliance with the on of this court with costs to be taxed against the ndants-appellants.

A. Daniel Fusaro,
Clerk.

APPENDIX G.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 33884, 33918-19, 33937

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE NATIONAL MARITIME UNION OF AMERICA,
Plaintiffs-Appellants,

v.

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL, ABRAHAM E. FREEDMAN AND LEON KARCHMER,
Defendants-Appellants,

(AND 3 OTHER CASES).

A petition for a rehearing having been filed herein by counsel for defendants-appellants Joseph Curran, Shannon Wall, William Perry and Abraham E. Freedman,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
ROBERT P. ANDERSON,
Circuit Judges.

I vote to grant.

JOHN A. DANAHER.

March 31, 1970.

APPENDIX H.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 33884, 33918-19, 33937

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE NATIONAL MARITIME UNION OF AMERICA,
Plaintiffs-Appellants,

v.

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL, ABRAHAM E. FREEDMAN AND LEON KARCHMER,
Defendants-Appellants,

(AND 3 OTHER CASES).

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for defendants-appellants Joseph Curran, Shannon Wall, William Perry and Abraham E. Freedman and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
Chief Judge.

March 31, 1970.

APPENDIX I.

Labor-Management Reporting and Disclosure Act P. L. 86-257, Title V, § 501(a), (b); Sept. 14, 1959, 29 U. S. C. A. 501(a) and (b).

§ 501. Fiduciary Responsibility of Officers of Labor Organizations—Duties of Officers; Exculpatory Provisions and Resolutions Void.

(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

Violation of duties; action by member after refusal or failure by labor organization to commence proceedings; jurisdiction; leave of court; counsel fees and expenses.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

APPENDIX J.

Relevant Provisions of Constitution of National Maritime Union.

1952 CONSTITUTION

ARTICLE 15

SALARIES OF OFFICERS

Section 1—Salaries and Expenses: The National Council, considering the financial state of the Union, is empowered, subject to approval of the membership to set from time to time the actual salaries and daily expenses of all union officers and employees. (1952 Constitution, Ex. C, page 59).

* * *

1960 CONSTITUTION

ARTICLE 14

COMPENSATION OF OFFICERS

Section 1—Salaries: (a) The National Council shall fix the salaries for all officers of the Union, subject to approval as provided by this Constitution. (1960 Constitution, Ex. D, page 56).

* * *

ARTICLE 8

NATIONAL OFFICE

Section 11—Employees of the Union: (a) The National Office shall be responsible for and shall fix the salaries of all technical, clerical and administrative personnel as may be required for the effective administration of the Union's affairs. Wherever possible, such employees shall be members of the NMU or of appropriate AFL-CIO affiliates.

(b) Collective bargaining agreements affecting employees of the NMU shall be negotiated by the National Office or such officer or officers as it may designate; provided that no such agreements shall be made without specific approval by the National Office. (1960 Constitution, Ex. D, page 34).

* * *

1969 AMENDMENTS TO CONSTITUTION

Add the following paragraph to Article 8, Section 11:

(d)—The National Office shall have the authority to provide pensions for all past and present employees of the Union and to protect the pension rights of all past and present employees of the Union.

Amend Article 14, Section 7 to read as follows:

Pensions: All officers and such employees as the National Office may designate shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish. The National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1618

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL, ABRAHAM E. FREEDMAN and LEON KARCHMER,

Petitioners,

v.

JAMES MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

ARTHUR E. MCINERNEY,
Counsel for Respondents,
74 Trinity Place,
New York, New York 10006.
(212) WH 4-7482

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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Statement

The respondents, James M. Morrissey, Joseph Padilla nd Ralph Ibrahim, individually and in their representa- ive capacity, respectfully pray that this Court shall deny he petition of Joseph Curran, Shannon Wall, William 'erry and Abraham E. Freedman heretofore filed herein o review the interlocutory judgment of the United States 'ourt of Appeals for the Second Circuit entered on March 1, 1970, in the above-entitled matter.

Outline of Previous Proceedings

In May of 1968 the respondents, who are members of the NMU, in good standing, became aware that a certain favored few employees of the union were being included in the NMU Officers' Pension Plan though they were not elected officers as defined in the NMU Constitution. On May 17, 1968, one of the respondents, James M. Morrissey, made demand on the union, its officers and governing body for an accounting and restoration of all damages for losses, liabilities, expenses and expenditures suffered by the National Maritime Union of America by reason of the purported coverage of non-officers in the NMU Officers' Pension Plan. No response was made to this demand.

On February 4, 1969, the respondents secured an order granting leave to institute this action. Petitioners Curran, Wall and Perry moved to dismiss the complaint under Rule 12(b)(5) F. R. Civ. P., or in the alternative for summary judgment under Rule 56. The respondents filed a cross motion for summary judgment against all defendants. On May 23, 1969, the District Court for the Southern District of New York denied petitioners' motion and granted respondents' cross motion (302 F. Supp. 32). It directed that the defendants account for and repay the union all pension funds paid to or for the account of non-elected Union employees, and that the defendant trustees be enjoined from paying into or out of the Officers' Pension Plan fund further benefits to or for the account of non-officers.

The National Council of the Union convened immediately after the announcement of the District Court's decision and proposed amendments which would give the National Office of the NMU the authority to designate certain non-elected employees eligible under the Officers' Pension Plan—an authority the District Court had found the National Office did not have under the 1960 constitu-

tion—and "to validate retroactively all pensions heretofore paid under the plan."

The petitioners moved to re-argue. This motion was made returnable June 17, 1969, one day before the voting on the proposed constitutional amendments would end. The respondents moved the court (returnable the same date) to enjoin the individual defendants (1) from using counsel employed by the union on a retainer basis and (2) from attempting to circumvent the decision of the District Court by their proposal of amendments to the Constitution which were designed to exculpate them from their individual liability. On July 3, 1969, the District Court made orders denying both motions.

On July 18, 1969, the interlocutory judgment was entered. This judgment, (1) denied the petitioners' motion for summary judgment; (2) granted the respondents' cross-motion for summary judgment; (3) directed the petitioners to account to the NMU for all pension funds paid to the "Officers' Pension Fund" for the account of non-elected Union employees and for all pension funds paid to non-elected Union employees from the "Officers' Pension Fund"; (4) enjoined the petitioners from making further payments to non-elected employees from the "Officers' Pension Fund"; and (5) implicitly enjoined the petitioners from making further payments to the "Officers' Pension Fund" for the account of non-elected Union employees.

The respondents appealed under 28 U.S.C. 1292 from the order of July 3, 1969, which had denied their motion to enjoin the petitioners from using Union counsel in defending the action and to declare that the proposed constitutional amendments were exculpatory and void.

The petitioners appealed from the interlocutory judgment which had granted the respondents' motion for an accounting and injunction.

The United States Court of Appeals for the Second Circuit on March 31, 1970 affirmed the interlocutory judgment in all respects; reversed the order of July 3, 1969, which had denied respondents' motion to enjoin the use by petitioner of Union counsel and to declare that the proposed constitutional amendment was void, and remanded to the District Court for further consistent action.

Questions Presented

1. The primary question here involved really is: Are union officials permitted to select a favored few non-elected employees to participate in the plan approved by the union membership for officers' participation and designated in the union constitution as the "Officers' Pension Plan"?

2. The secondary question is: May union officers exculpate themselves from liability by promulgating retroactive amendments to the constitution which purport to relieve the officers of the union and the trustees of the officers' pension plan of a liability imposed on them by an order of the United States District Court?

3. Can a labor union with fifty some odd thousand members be guilty of laches so as to bar the recovery of squandered trust funds?

Respondents' Statement of the Case

All the relevant facts are recited in the opinion of Judge Anderson below (Appendix 15-26).*

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* Petitioners omitted Article 14, Section 7 of the 1960 Constitution and Article 15, Section 8 of the 1960 Constitution, in printing the "Relevant Provisions" of the Union Constitution in their Appendix (Appendix 44-45). These Articles are of foremost relevance and importance and appear in the Appendix as footnotes to Judge Anderson's comprehensive opinion (Appendix 16-18).

The 1951 Constitution empowered the National Council, subject to the membership approval, to provide pension benefits for both employees and officers (Joint Appendix 26a-43a; Exhibit A, p. 1). Pursuant to the terms of that Constitution separate pensions were set up for officers and employees (Joint Appendix 28a).

Both the NMU Constitution (Exhibit C, p. 43) and the Officers' Pension Plan (Exhibit A, p. 2) specifically enumerated the persons who were officers (Joint Appendix 51a). This plan for the benefit of the officers was approved by the union membership.

Thus it was clear that the membership of the union wished that solely elected officers participate in this lucrative plan. They knew who would be participants—only those elected by them. This was not a plan designed for friends of the National Council, or secretaries, or janitors. "Covered employment" was limited to elected "officers" (Exhibit A, p. 2).

In October, 1960, the NMU Constitution was amended by a vote of the membership. Old Article 15 was removed and a new Article 14 was substituted in its place. New Article 14 provided for an Officers' Pension Plan and limited authorized pensioners to "officers." Employees other than officers were not mentioned in the section which authorized pensions.

The NMU Constitution, in effect in 1961 when the non-elected employees were added by the defendants, contained no provision permitting inclusion in the Officers' Pension Plan of employees who were not elected officers (Exhibit D, p. 58; Joint Appendix 43a). The 1960 Constitution did not continue the authority to include non-officers in *this*, the *Officers'* Pension Plan, but expressly and deliberately terminated it.

The respondents do not dispute the fact that the National Office under Article 8, Section 11(b) (Exhibit D,

p. 34) had the power to bargain collectively, or to continue employees' pension plans which earlier had been properly enacted under the sanctions of the earlier 1951 Constitution, Article 15, Section 8 (Exhibit C, p. 61). As already indicated, there had been separate employee pension plans established for non-elected employees prior to 1960 (Joint Appendix 28a). Those employees' pension plans, in all probability, received the required membership approval and had the blessings of the union membership. In any event, they are not under attack here. The quesions raised by the respondents in the case at bar, deal solely with the wrongful inclusion of favored non-elected employees in this, the NMU Officers' Pension Plan.

The petitioners admit that the effect of the decision of the Circuit Court will require the repayment of "hundreds of thousands of dollars" to the union (Petition, pp. 4-5). In fact, the record shows that William Perry—a non-elected employee, received a lump sum of well over $100,000.00 (Joint Appendix 103a)* from the Officers Pension Plan. In addition, he is receiving a second pension under the NMU Deep Sea Pension Plan (Joint Appendix 77a). For reasons which are evident, the question has never been placed squarely before the union membership of whether or not they wished non-elected employees of the NMU to be eligible to receive *two pensions* of any sort by virtue of their union employment (Joint Appendix 84a). There are those, other than petitioner William Perry, who

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* Although it does not appear in the record, Mr. Perry's office as "Assistant to the President" was created by the NMU only shortly before the amendment to the NMU Officers' Pension Plan, which purported to include him under the said Officers' Pension Plan. No other amounts involved have been disclosed to the respondents. Mr. Perry, who was never a duly elected officer, received a total of $190,064.74 in the fiscal year ending June 30, 1969, according to the records of the Department of Labor. Of course, the major portion of this figure consists of pension funds wrongfully paid from the Officer's Pension Plan.

have received and, unless this writ is denied, will be eligible to receive two pensions (Joint Appendix 71a).

Regardless of what the word "salary" has been interpreted to mean in completely dissimilar cases, the 1960 Constitution in the case at bar *carefully distinguishes* between the terms "salaries" and "pensions" (Appendix 21, Joint Appendix 52a). The petitioners knew that the inclusion of these favored employes was not authorized. The best illustration of this is the alacrity with which they attempted to amend retroactively the 1960 Constitution to exculpate themselves from the individual liability imposed on them by the decision of the Court below.

No matter how the petitioners strive to explain their actions, their attempt to annul the District Courts' decision by seeking to amend retroactively the Constitution, was a strident admission that the District Court had decided the case correctly in the first instance. It has been more colorfully said: "The wicked flee when no man pursueth."

Reasons for Denying the Writ

I. There is no conflict between the Circuits.

The decision below does not conflict with *English* v. *Cunningham* (C.A.D.C.), 282 F. 2d 848. In both *English* and the case at bar, unjustified interpretations of Union Rules made by Union officials were reversed by the Courts. Both are authority for the proposition that a Union official must act within the limits of his authority. *English* does not hold that the Courts must accept all intramural interpretations. In fact, *English* is authority for just the opposite. Courts may test the reasonabless and fairness of the acts of union officials. That is what the Court did

in *English*. That is what the Court did here. (See also *Highway Truck Drivers and Helpers, Local 107* v. *Cohen*, 284 F. 2d 162, cert. denied, 365 U. S. 833, discussed *infra*, pp. 8-9).

II. The decision below is consistent with decisions in other circuits.

When District Judge Bonsal held that the defendants (petitioners) must account for monies paid to and from the Officers' Pension Fund, the defendants were faced with substantial personal obligations. In desperation, they quickly proposed amendments through which they sought to be relieved of the obligations imposed by the decision. The 1969 amendments purported to authorize retroactively the very same expenditures of union funds made by the defendants out of the Officers' Plan to non-elected employees, which the District Court had already found were improper. These retroactive amendments were exculpatory within the meaning of 29 USC 501, void as against public policy and invalid. Incidentally (though not here material), they were adopted by a majority vote of a relatively small minority of members.

In invalidating those amendments, the Second Circuit applied the teaching of the Cohen cases. *Highway Truck Drivers and Helpers, Local 107* v. *Cohen*, 182 F. Supp. 608 (1960), 284 F. 2d 162 (1960), cert. denied 365 U. S. 833 (1961), and *Highway Truck Drivers and Helpers, Local 107* v. *Cohen*, 215 F. Supp. 938 (1963) aff'd 334 F. 2d 378 (1964), cert. denied 379 U. S. 921 (1964). In the first *Cohen* case the officers were enjoined from using union funds to pay counsel employed to defend union officers. The union local had adopted a resolution which, on its face, permitted such payment. However, the Court held that this resolution contravened the constitution of the International Union and was void for that reason.

here the Court placed an interpretation upon the constiıtion which differed from the interpretation placed ıereon by the local. In overruling the resolution the ourt held (284 F. 2d at p. 164) that the power to do so as in "complete accord with the letter and spirit of the abor Management Reporting and Disclosure Act."

After the decision in the first *Cohen* case the Internaonal Union amended its constitution so as to authorize ıch use of Union funds. This action was exculpatory, and the second Cohen case it was held that the payment by ıe Union of counsel fees under such circumstances "was consistent with Section 501 of the Labor-Management eporting and Disclosure Act." At page 381 of volume 34 F. 2d McLaughlin C.J., said:

> "Appellants also urge that the 1961 amendment to the International Union's Constitution ratifying the resolution of the Local which approved the payments makes moot plaintiffs' action to set aside those expenditures as ultra vires. That abortive attempt to validate the illegal 1959 resolution, could not, of course, in 1961 legitimatize the 1959 payments which have been held to have been wrongful. And the action of the International was just as inconsistent with Section 501 of the Labor Management Act as was the Local's ill-conceived resolution." *Highway Truck Drivers, Local 107* v. *Cohen,* 334 F. 2d 378 (1964, Third Circuit).

This Court denied certiorari in both cases.

III. Some 50,000 seamen cannot be held guilty of ches with respect to the misuse or misapplication of ion funds entrusted to the officers.

This action involves union funds entrusted to the offirs. It was brought for the benefit of the Union member-

ship, *i.e.*, all the members of the NMU—not a handful of friends of those in control. The funds restored on the settlement of the account will swell the general funds of the Union. Under such circumstances, laches can play no part in a determination on the merits.

Conclusion

Petitioner's application does not satisfy the considerations governing review on certiorari, as guided by Rule 19 and the practice of this Court. Therefore it does not meet the jurisdictional requirements but merely pertains to the Court's interpretation of a Union constitution in an interlocutory judgment and the steps taken by the Union officials to attempt to circumvent that interpretation.

There are no conflicts between the Circuits on the points here involved. This Court has already denied certiorari in similar cases.

There are no issues justifying the attention of this Court. The petition should be denied.

Dated: New York, New York, June 15, 1970.

Respectfully submitted,

ARTHUR E. MCINERNEY,
Counsel for Respondents,
74 Trinity Place,
New York, New York 10006.
(212) WH 4-7482

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Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION.

ABRAHAM E. FREEDMAN,
Lafayette Building, Eighth Floor,
Philadelphia, Pennsylvania. 19106,
Counsel for Petitioners Joseph Curran, Shannon Wall, William Perry and Abraham E. Freedman.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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whereas employees' salaries were fixed by the National Office without membership approval. To contend, therefore, that Article 14, Section 7 limited the NMU Officers Pension Plan to officers of the union is a wholly erroneous view.

Respondents concede that the pensions provided in collective bargaining agreements entered into with other unions for their employees is a valid exercise of the unions' right to fix salaries for employees of the unions. But, in this case they contend that the NMU Officers Pension Plan did not include employees of the union. This position is also completely unsound. As has been pointed out already in our Petition, the NMU Officers Pension Plan does not limit its coverage only to elected officers of the union. On the contrary, it covers employees who are not covered by other collective bargaining agreements. In this connection, respondents have shifted their position that the union constitution does not permit pensions to employees of the union. This shift now has been taken obviously to circumvent the provision in the union constitution which gives the National Office the right to fix salaries of the union's employees which includes the right to pensions. The fact that the collective bargaining agreements with certain employees of the union make provision for pensions completely destroys the whole fabric of respondents' argument. If the National Office has the right to fix pensions as part of salaries for some of its employees, it follows that it has the right to fix pensions as part of salaries for all of its employees.

Respondents suggest that William Perry is receiving two pensions from the union (Brief in Opposition, p. 6). This is completely incorrect. No employee and no officer of the union is receiving two pensions from the union. The pension that an individual may receive from the NMU Deep-Sea Pension Plan is a pension which a seaman earns while working as a seaman, and it is paid for solely by the companies. Only employees of the union who had previously

sailed as seamen would be eligible for such pensions if they served long enough, and their eligibility would be determined under the rules and regulations of the Deep-Sea Pension Plan. Most of the employees covered by the NMU Officers Pension Plan will be left without any pension whatsoever if the decision of the Court below is left standing. Any benefits which other employees may have received from the shipowners or any other source are completely irrelevant in determining the union's liability for pensions.

Respondents state that in *English v. Cunningham,* 282 F. 2d 848 (D. C. Cir. 1960), the court reversed the union's interpretation of its constitution. This is a completely incorrect statement. There, the Court of Appeals reversed a district court decision and approved the union's interpretation of its own election rules, citing the principle that a union's own fair and reasonable intrepretation of its constitution and rules will be accepted by the courts. In this case, both Courts below refused to follow the principle that if the union's interpretation was a fair and reasonable one, it must be accepted. Respondents conveniently misread the decision in the *English* case and its application to the facts at bar. In this connection, on this very point, this Court granted a writ of certiorari in the case of *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmith Forgers and Helpers AFL-CIO v. Hardeman,* October Term 1969, No. 1392, which action was taken on May 29, 1970, subsequent to the time our original Petition for Certiorari was filed. One of the issues on which certiorari was granted was:

> "Whether a federal court in a Section 102 proceeding reviewing an expulsion of a member by a union may apply a standard of review whereby the court substitutes its own factual findings and interpretations of the union's constitution and by-laws for those of the union."

This is precisely the point which we raise in this Petition. The lower courts, in their decisions in the *Hardeman* and instant cases, demonstrate a tendency on the part of some courts in actions under the Labor-Management Reporting and Disclosure Act of 1959 to substitute their own interpretations of the union constitution for those of the union, contrary to this Court's admonition that the Act was not intended to interfere with the right of unions to conduct their own affairs.[1] In view of the growing volume of litigation under the Act, we submit that there is urgent need for review by this Court of this problem so that both the lower federal courts and the unions can be guided in their duties and obligations under the statute.

Finally, respondents make the statement that the constitutional amendments involved in *Highway Truck Drivers and Helpers, Local 107 v. Cohen*, 284 F. 2d 162, *cert. den.*, 365 U. S. 833 and 334 F. 2d 378, *cert. den.*, 379 U. S. 921, were held to be invalid because they were "exculpatory" provisions prohibited by Section 501. This statement is also not correct. On the contrary, the Court specifically rejected the argument that the provisions there involved were "exculpatory". See 182 F. Supp. 608, 618. The basis of the *Local 107* decision was that the payments were contrary to the statute and that a constitutional amendment could not validate a payment prohibited by the statute. Here, the payments involved pensions for employees which are not prohibited by the statute. On the contrary, pensions are a wholesome, laudible action by the unions, and their authorization cannot possibly be construed to be "exculpatory".

Respondents have incorrectly read the facts and the law. Upon consideration of the foregoing, this Court

1. *Wirtz v. Glass Bottle Blowers Assn.*, 389 U. S. 463, 471, Text, n. 10 (1968); see *Wirtz v. Hotel Employees*, 391 U. S. 492, 497 (1968).

should grant the Petition for a Writ of Certiorari to the end that the decision of the Court below be reviewed and reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Counsel for Petitioners Joseph Curran, Shannon Wall, William Perry and Abraham E. Freedman.